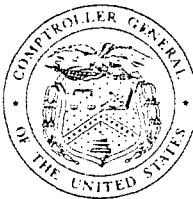


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DECISION



THE COMPTROLLER GENERAL
OF THE UNITED STATES
WASHINGTON, D.C. 20548

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FILE: B-193050

DATE: January 22, 1979

MATTER OF: Eglen Hovercraft, Incorporated

[Untimely Protest of Contract Award By Department of
The Army]

DIGEST:

1. Protest filed more than 10 days after receipt of initial adverse agency action (denial of protest against amendment) is dismissed as untimely pursuant to § 20.2(a) of GAO's Bid Protest Procedures. Although protester continued to protest to agency through Senator, it is nevertheless obligatory that protest be filed with GAO after notification of initial adverse agency action.
2. Protest against improper method of requesting offer extensions filed more than 10 days after last extension is untimely under § 20.2(b)(2) of procedures.
3. Protest concerning ambiguity in number of items to be awarded is untimely where it was not filed before closing date for receipt of proposals.
4. Where initial solicitation stated that option quantities would not be included in evaluation, protest based upon the nonexercise of options should have been filed before closing date for receipt of proposals.

DLG 00723

Eglen Hovercraft, Incorporated (Eglen), protests the award of a contract under solicitation No. DAAH01-78-R-0146, issued by the Department of the Army (Army), Redstone Arsenal, Alabama. AGC 00498

Eglen contends that (1) the Army erred in issuing amendment P0004 (violation of Defense Acquisition Regulation § 3-805.4 (1976 ed.)); (2) requests for extensions of offers were either not given each time in writing or were not given until Eglen called in and asked if it should extend its offer; (3) misinformation

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was given to Eglen regarding quantities of items to be purchased by the Army; and (4) if the options were to be exercised, the award may not have been made to the lowest offeror.

The Army contends that the protest is untimely under section 20.2 of our Bid Protest Procedures, 4 C.F.R. part 20 (1978), which states in pertinent part as follows:

"(a) Protesters are urged to seek resolution of their complaints initially with the contracting agency. If a protest has been filed initially with the contracting agency, any subsequent protest to the General Accounting Office filed within 10 days of formal notification of or actual or constructive knowledge of initial adverse agency action will be considered. * * *

"(b)(1) Protests based upon alleged improprieties in any type of solicitation which are apparent prior to bid opening or the closing date for receipt of initial proposals shall be filed prior to bid opening or the closing date for receipt of initial proposals. In the case of negotiated procurements, alleged improprieties which do not exist in the initial solicitation but which are subsequently incorporated therein must be protested not later than the next closing date for receipt of proposals following the incorporation.

"(2) In cases other than those covered in subparagraph (1) bid protests shall be filed not later than 10 days after the basis for protest is known or should have been known, whichever is earlier."

With regard to the first contention, that the Army erred in issuing amendment P0004, Eglen initially protested this to the Army by mailgram dated May 12, 1978. By letter dated June 2, 1978, the contracting officer informed Eglen that "Amendment P0004 as issued will remain effective and unchanged." Eglen subsequently filed its protest with our Office on September 29, 1978.

The Army's June 2 letter to Eglen in effect denied Eglen's protest and was initial adverse agency action. In order for Eglen's protest to have been considered timely by GAO, the protest should have been filed (received) within 10 working days of its receipt of the June 2 letter. However, Eglen did not file its protest with GAO until September 29. Instead of Eglen protesting to our Office, it continued to participate in the procurement. Although Eglen continued to protest to the Army through a United States Senator, it was on constructive notice of our Bid Protest Procedures since their contents, including the time limits set for filing, are published in the Code of Federal Regulations. Moreover, while we realize that a protester may consider any agency's decision ill-founded or inadequately explained, leading the protester to seek reconsideration or clarification at the agency or other level, it is nevertheless obligatory that the protest be filed with GAO after notification of initial adverse agency action. Mr. Scrub Car Wash Systems, Inc., B-186586, July 9, 1976, 76-2 CPD 29. The first contention is therefore untimely.

Regarding Eglen's second contention, that the requests for extensions of offers were either not given in writing or were not given until Eglen called the Army to ask if its offer should be extended, it appears, by Eglen's November 21, 1978, letter to our Office, to relate to events that took place from April 14 until September 8. Eglen's protest on this contention was not filed with GAO until October 16, 1978, more than 10 days after it knew of the last of the alleged irregularities. The second contention is also untimely.

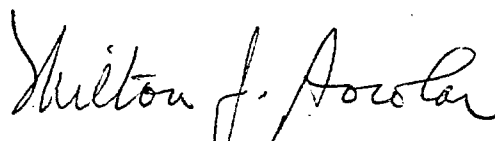
The third contention is that the Army misinformed Eglen of the quantities of items to be purchased. By letter dated December 28, 1977, Eglen requested clarification of the "quantity of transmitters and IR sources to bid." In response to the request, the Army issued amendment P0002 on January 4, 1978. Eglen did not request further clarification after receipt of amendment P0002. In response to technical questions submitted

by other offerors, the Army issued amendment P0003, which extended the closing date for receipt of proposals to February 13, 1978. On July 27, 1978, negotiations were conducted with Eglen, at which time Eglen was advised that its best and final offer should be submitted by August 4, 1978. Formal notice was issued by a message dated July 28, 1978, to all offerors. Eglen submitted its best and final offer on August 4, 1978. According to the record, Eglen knew this basis of protest on or before August 4 and did not file its protest on this point with GAO until October 16. Since no protest on this point was filed prior to submission of best and final offers, this basis of protest is untimely under § 20.2(b)(1), supra.

With regard to the fourth contention, that if the options were to be exercised the award may not have been made to the lowest bidder and can only be determined post facto, it should be pointed out that the initial RFP, issued on December 28, 1977, stated that option quantities would not be included in the evaluation. Pursuant to section 20.2(b)(1), supra, if Eglen thought this was improper, it should have protested, at the latest, before submission of its best and final offer. However, Eglen did not file its protest on this point until October 16 and it is therefore untimely.

Eglen further submits that its protest should be considered under § 20.2(c) of our Procedures which does permit consideration of untimely protests where good cause is shown or where issues significant to procurement practices are raised. The good cause exception generally refers to some compelling reason beyond the protester's control which prevented it from filing a timely protest. See 52 Comp. Gen. 20, 23 (1972); R.A. Miller Industries, Inc. (Reconsideration), B-187183, January 14, 1977, 77-1 CPD 32. The significant issue exception is limited to issues which are of widespread interest to the procurement community and is exercised sparingly so that timeliness standards do not become meaningless. R.A. Miller Industries, Inc., supra. We see nothing in the present case to warrant invoking either exception.

In view of the above, the protest is dismissed
as untimely.

A handwritten signature in cursive script, reading "Milton J. Socolar". The signature is written in dark ink and is positioned above the printed name and title.

Milton J. Socolar
General Counsel